No. 95-244

In the

Supreme Court of the United States

OCTOBER TERM, 1995

CHUCK QUACKENBUSH, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, IN HIS CAPACITY AS LIQUIDATOR AND TRUSTEE OF THE MISSION INSURANCE COMPANY TRUST, MISSION NATIONAL INSURANCE COMPANY TRUST, ENTERPRISE INSURANCE COMPANY TRUST, HOLLAND-AMERICA INSURANCE COMPANY TRUST AND MISSION REINSURANCE CORPORATION TRUST,
Petitioner,
vs.
ALLSTATE INSURANCE COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

1. Whether an order remanding a removed action to state court based on the *Burford* abstention doctrine is reviewable by appeal, and not merely by mandamus, under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

2. Whether an action at law which seeks only money damages, and no equitable relief, can present the exceptional circumstances necessary for a federal court to decline to exercise its jurisdiction based on *Burford* abstention, or instead whether *Burford* abstention is appropriate only in equitable proceedings.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

The Appellant in the Ninth Circuit and Respondent here is Allstate Insurance Company. The Appellee in the Ninth Circuit was John Garamendi, Insurance Commissioner of the State of California, in his capacity as Liquidator of Mission Insurance Company, Mission National Insurance Company, Enterprise Insurance Company, Holland-America Insurance Company, and Mission Reinsurance Corporation. Chuck Quackenbush, the Petitioner here, is the statutory successor to Mr. Garamendi.

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Respondent Allstate Insurance Company ("Allstate") respectfully submits this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner Chuck Quackenbush, Insurance Commissioner of the State of California, as the Liquidator of the Mission Group of Insurance Companies ("the Liquidator").

OPINIONS BELOW

Allstate does not disagree with the citations to the opinions below contained in the Petition. In addition, Allstate reproduces as Appendix 1 the order of the Ninth Circuit issued on February 14, 1992 denying the Liquidator's motion to dismiss the appeal below.

JURISDICTION

Allstate agrees with the statement of jurisdiction contained in the Petition.

STATUTES INVOLVED

In addition to those statutes cited in the Petition, Allstate identifies 28 U.S.C. § 1447 and the Federal Arbitration Act, 9 U.S.C. §§ 1-16, as statutes involved in this case. Those provisions are set forth in Appendix 2 hereto.

Allstate disagrees with the Liquidator's assertion that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, and the cited provisions of the California Insurance Code (Pet. Cert., at 2) are involved in this case within the meaning of this Court's Rule 14.1(f).

STATEMENT OF THE CASE

This is a civil damages action filed by the California Insurance Commissioner as liquidator of five members of the Mission Group of Insurance Companies ("Mission"). The lawsuit was filed in Los Angeles Superior Court in June 1990 against Allstate and several other companies that had reinsured Mission affiliates.[1] The dispute vis-a-vis

[1]The term "reinsurance" refers to the practice by which one insurer spreads its insurance risk by assigning (or "ceding") portions of its risk to other insurance companies acting as "reinsurers." Typically, the

Missionand Allstate arises from Allstate's having been both reinsured by Mission and a reinsurer of Mission under more than five thousand separate reinsurance agreements entered into during the period of November 1976 to August 1984. The Liquidator seeks to recover reinsurance balances of approximately $7 million allegedly due from Allstate as a reinsurer of Mission. Allstate disputes the balances claimed from it, contending, among other defenses, that Allstate is entitled to set off approximately $24 million in reinsurance balances that are due Allstate from Mission as Allstate's reinsurer.[2]

Though this action was filed by the California Insurance Commissioner in his capacity as liquidator of Mission, the lawsuit is a straightforward commercial reinsurance dispute. The claims asserted by the Liquidator are entirely derivative of those held by Mission before its insolvency. The Liquidator contends, principally, that Allstate breached its contractual obligations to Mission by failing to pay reinsurance balances that are due. Based on this allegation, the Commissioner's complaint states claims for breach of contract, tortious breach of the covenant of good faith and fair dealing, tortious denial of the existence of contract, and declaratory relief.

Just as important, the only remedy sought by the Liquidator is an award of money damages for the reinsur-

reinsurers agree to assume a percentage of the risk under an insurance policy or class of policies in return for a corresponding share of the premiums. *See generally* H. Kramer, *The Nature of Reinsurance*, at 1-3, in R. Strain (ed.), REINSURANCE (1980).

[2]The $7 and $24 million figures consist of three categories: paid losses, reserves established for known claims, and reserves for "incurred but not reported" claims (known in the industry as "IBNR"), that is, claims for losses that have been incurred but have not been reported by the insured.

ance balances allegedly due.[3] Thus, this lawsuit presents no risk of interference with any state administrative proceeding or policy. Indeed, the only impact this case can have on the liquidation of Mission is that, if the Liquidator prevails, there will be marginally more money available to distribute to Mission's creditors than the $1.2 billion the Liquidator has reportedly collected from other reinsurers.

In fact, the California Insurance Commissioner routinely files collection actions like this case in state and federal courts throughout the country. For this reason, the California Superior Court order appointing the Commissioner as Mission's liquidator expressly empowers him to bring suits "in other state courts" to recover assets on Mission's behalf.[4] The federal courts, over a period of years, have asserted jurisdiction repeatedly over precisely such civil collection suits by liquidators of insolvent insurers — including suits by the California Insurance Commissioner seeking to recover reinsurance balances due an insolvent insurer.[5]

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[3]The Commissioner also prays for the functionally equivalent remedy of a declaration as to the parties' respective liability under the reinsurance agreements at issue.

[4]See "Order Appointing Liquidator and Restraining Order" included in Appendix E to the Petition for Certiorari at page 119a. Paragraph 13 of this Order provides:

> [The] liquidator is hereby authorized to initiate such equitable or legal actions or proceedings in this *or other states* as may appear to him necessary to carry out his function as liquidator.

Appendix at 121a (emphasis supplied).

[5]*See, e.g., American Re-Insurance Co. v. Insurance Comm'r of California*, 527 F. Supp. 444 (C.D. Cal. 1981) (diversity suit brought by a reinsurer seeking declaratory relief against the California Insurance Commissioner as receiver for an insolvent insurer); *Excess & Casualty Reinsurance Ass'n v. Insurance Comm'r of California*, 656 F.2d 491 (9th Cir. 1981) (interpleader suit brought by a reinsurer seeking a determination of who should receive reinsurance proceeds upon the insolvency of a reinsured company); *In Re Delta America Re Insurance Co.*, 900 F.2d 890 (6th Cir.), *cert. denied*, 498 U.S. 890 (1990) (reversing order remanding to state court suit brought by Kentucky Insurance Commissioner to recover reinsurance proceeds due insolvent insurer); *Hager v. Davis Transport, Inc.*, 901 F.2d 1470 (8th Cir. 1990) (suit by Iowa Insurance Commissioner seeking to recover unpaid premiums due insolvent insurer; action removed to federal court by defendant insurer); *Ainsworth v. Allstate Ins. Co.*, 634 F. Supp. 52 (W.D. Mo. 1985) (suit by Missouri receiver of two insolvent insurers to recover reinsurance balances; defendants removed action to federal court, which ordered arbitration).

Allstate removed this action on August 2, 1990 to the United States District Court for the Central District of California on the basis of diversity of citizenship.[6] Allstate then moved under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, to compel arbitration of the Liquidator's claims against it based on arbitration agreements contained in virtually all of the reinsurance agreements between Allstate and Mission.[7] The District Court ordered the motion off calendar to consider first whether the action should proceed in the federal court.

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[6]There were 19 reinsurers named as defendants in the Superior Court lawsuit against Allstate. Of these defendants, only two — Allstate and the Insurance Company of North America (INA) — were ever served. Allstate removed the Superior Court action to federal court on the ground that there was diversity jurisdiction vis-a-vis Allstate and the Commissioner and the claims asserted against Allstate were separate and independent of the claims alleged against non-diverse defendants, permitting removal under 28 U.S.C. § 1441(c). Subsequently, the Commissioner filed a notice of dismissal of all non-diverse defendants. This led Allstate and INA to file a supplemental petition to remove based on complete diversity between the plaintiff and the remaining defendants.

[7]Arbitration agreements are contained in each of the large reinsurance "treaties" entered into between Allstate and Mission. These reinsurance treaties, some 67 in number, cover large classes of business, and give rise to the vast majority of the reinsurance balances in dispute. The other reinsurance agreements, covering a single, large risk, are known as "facultative certificates"; virtually all of these agreements also contained provisions for binding industry arbitration.

On July 3, 1991, the District Court entered an order remanding the case to Los Angeles Superior Court. The District Court's remand order, while rejecting most of the Liquidator's arguments in support of his remand motion, concluded that it was proper to abstain from exercising jurisdiction over this case under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). The District Court emphasized that a central issue in this case is Allstate's defense of set-off, *i.e.*, that Allstate is entitled to set off balances due it from Mission against the balances the Commissioner seeks to recover on Mission's behalf. Noting that this issue was controlled by state law and that the Los Angeles Superior Court had developed an "intimate familiarity" with the law in this area, the District Court concluded that *Burford* abstention was warranted.

Allstate timely appealed from the remand order. Allstate's notice of appeal prayed that, in the event the appeal were found not to lie, it be treated as a petition for writ of mandamus. After the parties' opening briefs had been filed, the Insurance Commissioner moved for an order dismissing the appeal and peremptorily denying the petition for writ of mandamus on the ground that no abuse of discretion could be shown. The Ninth Circuit denied the motion to dismiss, noting that "[b]ecause the remand order was not based on jurisdictional grounds, the prohibition on appellate review imposed by 28 U.S.C. § 1447(d) does not apply." February 14, 1992 Order (attached as Appendix 1) at 1-2 (citing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52 (1976)). The Ninth Circuit's order did not resolve the question of whether review was available by appeal or mandamus, referring this issue "to the merits panel for such consideration as it deems appropriate." *Id.* at p.2.

Oral argument was held before the Ninth Circuit on November 5, 1993. On February 2, 1995 the Ninth Circuit, in a unanimous opinion, reversed the order of remand. The

Ninth Circuit first concluded that Allstate's appeal from the remand order was proper. The Ninth Circuit noted that, in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11-13 (1983), this Court had held that some "orders declining to exercise jurisdiction may be appealable" under the collateral order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.* Noting that *Moses H. Cone* held that "an order staying a federal action pursuant to abstention . . . qualifies as an appealable final collateral order," the Ninth Circuit concluded "that a remand order based on abstention" likewise is "a final collateral order that is reviewable on appeal." *Garamendi v. Allstate Ins. Co.*, 47 F.3d 350, 353 (9th Cir. 1995).

Having found that the remand order was properly appealable, the Ninth Circuit then concluded that abstention was not appropriate in this case. Noting that the Commissioner merely sought to recover money damages on behalf of Mission and did not seek any equitable relief that might interfere with the ongoing proceedings for the liquidation of Mission, the Ninth Circuit concluded that abstention under *Burford* was not justified. Relying on the carefully chosen words of this Court's opinions in a series of *Burford* abstention cases, the court below concluded that *Burford* abstention — long recognized as a power of federal courts sitting in equity — should not be extended to simple actions at law for the recovery of money damages. Any other result, the Ninth Circuit concluded, would contravene the federal courts' "virtually unflagging" obligation to exercise the jurisdiction conferred upon them by the Constitution. 47 F.3d at 356 (quoting *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989)).

On February 16, 1995, the Commissioner filed a petition for rehearing and suggestion for rehearing *en banc*, arguing for the first time that the Commissioner in fact seeks equitable relief, namely a declaration of the parties'

respective liability. On May 19, 1995, the Ninth Circuit denied rehearing. The Court's order noted that the Commissioner had not previously argued that its declaratory relief claim was equitable in nature and therefore could not be heard to raise this argument for the first time in a petition for rehearing. (See Pet. Cert., Appendix C.)

SUMMARY OF ARGUMENT

Neither of the issues on which the Liquidator urges this Court to grant review, Allstate submits, justifies intervention at this time by the nation's highest court. On the first issue identified by the Liquidator — the appealability of remand orders — there is substantial unanimity in the Courts of Appeals. In the wake of this Court's ruling in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52 (1976), the lower courts have uniformly recognized that many orders of remand — namely, those not based on defects in removal procedure — are subject to appellate review. The courts likewise are in agreement that at least some remand orders are reviewable by appeal, and not merely by mandamus. For instance, every Circuit Court to consider the issue has held that remand orders based on a forum selection clause contained in an agreement between the litigants represents a final order on a collateral matter permitting appeal under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The Liquidator argues, however, that the Circuit Courts are not fully in agreement on whether remand orders based on abstention qualify for appeal under the collateral order doctrine. The Ninth Circuit below held that they do, a ruling that seems compelled by this Court's holding in *Moses H. Cone* that an order *staying* a federal court suit based on abstention is a final, appealable order. With considerable reluctance, the Second Circuit seven years ago reached a contrary conclusion, expressly noting that it felt

bound to follow earlier circuit precedent that seemed inconsistent with the holding in *Moses H. Cone. Corcoran v. Ardra Ins. Co.*, 842 F.2d 31 (2d Cir. 1988). More recently, in *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993), the First Circuit held that a particular abstention-based remand order was not appealable, notwithstanding the holding of *Moses H. Cone*. But the First Circuit went out of its way to note that "there is no absolute rule either prohibiting or permitting immediate appellate review of remand-related orders under the *Cohen* rubric," and that "courts must apply the multi-pronged *Cohen* test to each remand order (or, at least, to each *type* of remand order) in an individualized, case-specific manner." 6 F.3d at 862 (emphasis in original). Thus, in future First Circuit decisions, many and perhaps all abstention-based remand orders may be found to be appealable on their particular facts.

The other issue the Liquidator urges as a basis for granting review is whether the Ninth Circuit correctly held that *Burford* abstention does not apply in garden-variety civil damages actions like this one. For several reasons, this issue does not afford a basis for intervention by this Court at the present time. As a starting point, the Liquidator would not have the Court even reach this issue, since the Liquidator contends that Allstate should not have been permitted to appeal from the remand order. To the extent, therefore, there is any merit to the appealability issue, it casts doubt on whether the Court would be called upon even to consider the seemingly weightier issue of whether *Burford* abstention should be extended to garden-variety civil damages actions.

In any event, as demonstrated below, the Ninth Circuit's holding on the abstention issue is compelled by a series of decisions by this Court, culminating in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"). The essence of the *Burford* abstention doctrine is that in exceptional cases a

federal court may decline to exercise its jurisdiction to avoid improperly interfering with proceedings or orders of state administrative agencies. Where the only relief sought is an award of money damages, there can be no appreciable risk of any such interference. This case, indeed, amply demonstrates the point. The only impact this litigation can have on Mission's insolvency proceedings is that if the Commissioner prevails there will be marginally more money to distribute to Mission's creditors than otherwise would be the case.

Moreover, the Ninth Circuit's ruling with respect to the scope of the *Burford* extension doctrine is precisely the sort of issue that should be allowed to percolate at the lower court level for the present time. Since this Court's decision in *NOPSI*, the Ninth Circuit has held that *Burford* abstention generally does not apply in actions at law. Two District Courts have reached the same conclusion, and two other circuits — the First and Third — have at least expressed their strong inclination to the same view. Opposing these authorities is a single paragraph at the end of a recent Eighth Circuit decision, in which that Court of Appeals questioned the wisdom of limiting *Burford* to equitable proceedings. The principal basis for the Eighth Circuit's holding, however, was that the action arose under ERISA, and therefore could not be readily classified as legal or equitable in nature.

Future doctrinal developments at the lower court level may yield substantial or even complete unanimity among the circuits on the scope of *Burford* abstention. Moreover, the factual contexts in which this issue will arise in the future will provide a suitable proving ground for testing the impact and wisdom of the Ninth Circuit's holding. Allstate expects that future developments will show the wisdom of circumscribing the *Burford* abstention doctrine within the equitable arena. But if developments turn out otherwise and

the circuits fail to reach accord on the scope of this abstention doctrine, there will be ample opportunity at that time for this Court to intervene.

ARGUMENT

I.

THE DISTRICT COURT'S REMAND ORDER WAS A COLLATERALLY FINAL ORDER WHICH GAVE RISE TO A RIGHT OF APPEAL.

The first ground urged by the Liquidator in support of the Petition for Certiorari arises from the Ninth Circuit's holding that the District Court's order of remand is appealable under the collateral order doctrine. For several reasons, Allstate submits, this holding does not present a basis for granting review.

On its face, 28 U.S.C. § 1447(d) seems to preclude appellate review of remand orders. That section provides that such orders are "not reviewable on appeal or otherwise." However, since this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52 (1976), it has been settled that "only remand orders issued under [28 U.S.C.] § 1447(c) and invoking the grounds specified therein — that removal was improvident and without jurisdiction — are immune from review under § 1447(d)." *Id.* at 346. Allstate knows of no decision, and the Liquidator cites none, even suggesting that a remand order based on abstention is one issued under section 1447(c) which is immune from all forms of appellate review.

Thus, the only issue of potential controversy here is whether remand orders based on abstention are reviewable by appeal, and not merely by mandamus. As the Court of Appeals noted below, in *Thermtron* this Court initially suggested that mandamus was the appropriate means of

appellate review in such circumstances. 47 F.3d at 353, citing *Thermtron*, 423 U.S. at 352-53. As the Ninth Circuit went on to note, however, this Court later recognized — in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) — that some orders of abstention may properly be appealed as final orders under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). 47 F.3d at 353.

In *Moses H. Cone*, this Court held that an order staying a federal case on the basis of *Colorado River*[8] abstention was directly appealable. 460 U.S. at 9-13. The Court reasoned that "a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum," and therefore the defendant was " 'effectively out of [federal] court.' " 460 U.S. at 10-11 (quoting *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962)). As a result, the Court concluded, the order of stay was a final order appealable under 28 U.S.C. § 1291. 460 U.S. at 13.

The stay order in *Moses H. Cone* also qualified for appeal, the Court held, under the *Cohen* collateral order doctrine. The Court noted that the factors "required to show finality" under the *Cohen* rule are as follows:

> To come within the 'small class' of decisions excepted from the final judgment rule by *Cohen*, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action,

[8] *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

> and [3] be effectively unreviewable on appeal from a final judgment.

460 U.S. at 11-12 (quoting *Coopers & Lybrand v. Livesay* 437 U.S. 463, 468 (1978)(footnote omitted)). The stay order, this Court concluded, met each of these three requirements.

As the Ninth Circuit observed, an order of remand even more clearly satisfies the three prongs of the *Cohen* test. Indeed, if anything a remand order more clearly puts the parties "effectively out of federal court" than does an order merely *staying* the federal proceeding. Likewise, when *Burford* abstention is invoked in a lawsuit commenced in a federal court, it typically results in an order of dismissal,[9] which then is appealable as a final order under 28 U.S.C. § 1291. Thus, it would be anomalous at best if an order of remand based on abstention were not reviewable by appeal, when equivalent abstention rulings resulting in stay or dismissal are directly appealable.

It therefore comes as no surprise that the Ninth Circuit, relying principally on *Moses H. Cone*, concluded that the District Court's remand order here gave rise to a right of appeal under the collateral order doctrine. The Ninth Circuit's ruling finds considerable support in previous rulings, both within the Ninth Circuit and by other circuits, dating back more than a decade. In *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), the Court of Appeals held that a remand order based on a "substantive decision on the merits apart from any jurisdictional decision" — namely, the enforceability of a forum selection clause contained in a contract between the parties — is appealable under 28 U.S.C. § 1291 as a collaterally

[9] *See generally* E. Chemerinsky, FEDERAL JURISDICTION § 12.3 at 612 (1989) (*Burford* abstention "requires the federal court to dismiss the case").

final order. 741 F.2d at 276. Several other circuits have endorsed this rule. *See McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d 1199, 1203 (5th Cir. 1991) ("we review the district court's remand order, which the court issued pursuant to [a forum selection clause in] the parties' contract, on appeal under *Cohen's* collateral order doctrine"); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir.), *cert. denied*, 502 U.S. 908 (1991) ("an order remanding a case pursuant to a forum selection clause is 'final' for purposes of . . . the collateral order doctrine"); *Regis Assocs. v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990) (appeal lies from order remanding action based on forum selection clause, under rule that "a remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction"). Most recently, the Eighth Circuit — permitting a direct appeal from an order declining to lift a previously-imposed stay on federal proceedings — broadly held that "a federal court order abstaining because of a parallel state proceeding . . . is appealable under the collateral-order doctrine." *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141, 144 (8th Cir. 1995). This holding is not without a touch of irony here, since *Wolfson* is the decision on which the Liquidator principally relies in urging this Court's review of the Ninth Circuit's ruling on the merits of whether abstention was proper in this case.

The Liquidator contends that two decisions — one in the First and the other in the Second Circuit — are not in accord with the foregoing views, and that this divergence supports the grant of certiorari.[10] The Second Circuit deci-

[10]The Liquidator does not rely on two other decisions which, discussing the issue only briefly, conclude that remand orders based on abstention are reviewable by mandamus rather than appeal. *Pas v. Travelers Ins. Co.*, 7 F.3d 349, 353 (3d Cir. 1993); *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1500-01 (8th Cir. 1992). Both decisions base their ruling on *Thermtron*, failing to address this Court's later holding in *Moses H. Cone* that stay orders based on abstention are appealable. Thus, as the Liquidator appears to recognize, neither decision can be said to present a meaningful conflict with the Ninth Circuit's decision below.

sion on which the Liquidator relies, *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31 (2d Cir. 1988), did hold that a remand order based on abstention should be reviewed by mandamus rather than appeal. 842 F.2d at 34-35. It has been questioned whether this ruling was consistent with another Second Circuit case, *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988), allowing a direct appeal from a remand order based on a forum selection clause.[11] And in *Corcoran v. Ardra*, the Second Circuit regarded the kind of suit before it as presenting a powerful case for the review by appeal that it felt reluctantly bound not to allow. As the Second Circuit stated: "Under the surrender-of-federal-jurisdiction test used in *Moses Cone*, we wonder whether it can logically or prudently remain the rule that a reviewable remand order (*i.e.*, one whose review is not barred by § 1447(d)) is not reviewable by direct appeal." 842 F.2d at 34.

Moreover, the most recent Second Circuit decision on point appears to limit *Corcoran v. Ardra* to its facts. In *Minot v. Eckardt-Minot*, 13 F.3d 590 (2d Cir. 1994), the Second Circuit permitted a direct appeal from an abstention-based order of remand, issued because related child custody issues were pending in state court. *See* 13 F.3d at 593. The Second Circuit found that *Corcoran v. Ardra* did not compel a different result, since "*Corcoran* explained that when a district court's remand conclusively determines a

[11] *See McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d at 1203 n.5 ("We think that *Corcoran [v. Ardra]* was wrongly decided . . . [T]he *Corcoran* court did not adequately distinguish *Karl Koch Erecting Co.* . . .").

collateral question (such as where the merits of a litigation will be resolved), that decision is appealable under the collateral-order doctrine." *Id.* The court concluded that "[s]ince the remand order in this case conclusively determined that a state court would decide the merits of the underlying dispute, direct appeal of the remand decision is appropriate." *Id.* Based on this language, it seems clear that the Second Circuit would have allowed an appeal in the present case, just as the Ninth Circuit did.[12]

The only other decision on which the Liquidator relies is *Doughty v. Underwriters at Lloyd's, London*, 6 F.3d 856 (1st Cir. 1993). As a practical matter, it is far from clear that *Doughty* represents any actual conflict with the Ninth Circuit. *Doughty* first holds that a remand order is not a "final order" under 28 U.S.C. § 1291, a question not reached by the Ninth Circuit, which held only that an abstention-based remand order is appealable as a collaterally final order under *Cohen*. *Compare Doughty*, 6 F.3d at 860-62 *with Garamendi*, 47 F.3d at 353. While *Doughty* ruled that the remand order before the court did not qualify for direct appeal under the collateral order doctrine, the

[12]The Second Circuit apparently found *Corcoran v. Ardra* distinguishable because the defendants there had removed the action on the basis of 9 U.S.C. § 205, which permits removal of any state court action relating to "an arbitration agreement or award falling under the [Foreign Arbitral Awards] Convention," and the federal court had not ruled on the question of whether the defendants were entitled to compel arbitration under the Convention. Thus, the remand order in *Corcoran v. Ardra* "return[ed] to the state court the threshold question of where the underlying dispute is to be decided." *Minot*, 13 F.3d at 593 n.1. Although Allstate also seeks to compel arbitration, Allstate removed the present case on the basis of diversity jurisdiction, not 9 U.S.C. § 205. Thus, there is an independent basis for federal jurisdiction here unrelated to Allstate's motion to compel arbitration. On these facts, it seems clear that the Second Circuit would recognize a right of appeal from an abstention-based remand order.

First Circuit did not adopt a blanket rule that such orders never are appealable. Instead, the First Circuit held that:

> [T]here is no absolute rule either prohibiting or permitting immediate appellate review of remand-related orders under the *Cohen* rubric. . . . Rather, courts must apply the multi-pronged *Cohen* test to each remand order (or, at least, to each *type* of remand order) in an individualized, case-specific manner.

Id. at 862 (emphasis in original).

This holding leaves open the substantial possibility that, in practice, the First Circuit may permit subsequent appeals in remand orders based on abstention, as application of the three-part *Cohen* test may dictate in a given case. As a practical matter, therefore, the First Circuit's decision may represent no departure, or only a minimal departure, from the views expressed by the Ninth Circuit panel. At a minimum, it would be prudent to await further doctrinal developments in the First Circuit, which will demonstrate the degree, if any, to which the decisions of the First and Ninth Circuits are in conflict.

Even if there were a conflict among the circuits regarding the appealability of abstention-based remand orders, that conflict would have little practical impact on the resolution of like cases. Whether review is had by appeal or by mandamus may not affect the ultimate outcome at the appellate level. In the Ninth Circuit, for instance, decisions to abstain — once the "requirements for the abstention doctrine being invoked" are met — are reviewed on appeal for abuse of discretion. *Garamendi*, 47 F.3d at 354. An abuse of discretion standard is also employed in mandamus review. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). In either case, the courts have recognized that a substantially heightened abuse of discretion standard should apply.

In light of the obligation of the federal courts to exercise the jurisdiction conferred on them except in the most exceptional cases, "there is little or no discretion to abstain in a case which does not meet traditional abstention requirements." *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 540 (9th Cir. 1985) (quoting *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983)); *accord University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 269-70 (3d Cir. 1991) ("The determination of whether this case falls in the area within which the district court may exercise discretion [to abstain] is therefore a matter of law, reviewable on a plenary basis.") Thus, even if the Circuit Courts eventually diverge on the question of whether remand orders based on abstention are reviewable by appeal or only by mandamus, this does not necessarily betoken any material disparity in the resolution of the ultimate issue presented — namely whether abstention was proper.

It is to that question that Allstate now turns.

II.

THE NINTH CIRCUIT'S ABSTENTION ORDER IS CONSISTENT WITH THIS COURT'S PREVIOUS RULINGS AND WITH THE CURRENT TREND IN THE CASELAW.

The starting point for any examination of whether a District Court should abstain from hearing a dispute within the jurisdiction conferred upon it is to recognize that abstention is an extraordinary step that can be justified only in very rare circumstances. This Court has emphasized the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conser-*

vation Dist. v. United States, 424 U.S. 800, 817 (1976). This Court likewise has held:

> The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

Moses H. Cone, 460 U.S. at 14 (quoting *Colorado River*, 424 U.S. at 813).

Moses H. Cone also established another controlling principle: "[T]he presence of federal law issues must always be a major consideration weighing against surrender" of jurisdiction by the federal district court. 460 U.S. at 26. This observation could hardly be of more obvious import here, since the federal law issue present in *Moses H. Cone* is the identical federal law issue presented here — whether arbitration of the plaintiff's claims must be ordered under the Federal Arbitration Act.

The fact that Allstate removed this case based on the federal court's diversity jurisdiction is also a relevant factor in addressing the *Burford* abstention issue. First, this case is a paradigmatic one for invocation of diversity jurisdiction: Allstate is an out-of-state defendant which prefers to litigate against a state official in federal rather than state court.[13]

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[13] *See* R. Jacks, *Arbitration & Insurer Insolvencies: The Triumph of Common Sense Over Abstract Principle*, in ABA NATIONAL INSTITUTE ON INSURER INSOLVENCY, LAW & PRACTICE OF INSURANCE COMPANY INSOLVENCY at 260, 261 (1986) ("state rehabilitators and liquidators prefer to resolve disputes between insurers and their reinsurers in a friendly forum where they can expect to be treated with something more than normal deference"); Spector, *When Your Rein-*

The grant of diversity jurisdiction gave Allstate the right to choose between these forums. Second, the fact that the Liquidator's claims arise under state law does not distinguish this case from any other diversity action, and therefore by itself affords no basis for abstention. Federal courts decide state law issues, clear and unclear, in every diversity case. As this Court recently reaffirmed, " '[a]pplication of the 'State law' to the present case . . . does not present the disputants with duties difficult or strange.' " *Salve Regina College v. Russell*, 499 U.S. 225, 227 (1991) (quoting *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208-09 (1938)). In fact, a body of jurisprudence has developed specifically to aid the federal courts in determining how, in the absence of a controlling state court decision, the highest court of the state would resolve a particular legal issue. *See generally* 19 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 4507 (1982).[14]

While the foregoing principles formed the backdrop for the Ninth Circuit's opinion below, an equally fundamental premise was the gist of its ruling. As the Ninth Circuit observed, this Court's decisions supporting abstention under *Burford* have confined that abstention doctrine to equitable proceedings rather than actions at law for the recovery of money damages. In an opinion that even the Liquidator acknowledges was "narrowly focused" (Pet. Cert. at 11),

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surance Partner Goes Bust, in BEST'S REVIEW: PROPERTY-CASUALTY INS. ED. (1986) (noting that in lawsuits to recover balances due insolvent insurers, "liquidators enjoy an enormous home field advantage" in their own state courts).

[14] For instance, more than 50 years ago this Court instructed that:

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

West v. American Tel. & Tel. Co., 311 U.S. 223, 237 (1940).

the Ninth Circuit found that abstention was improper because "the power of federal courts to abstain from exercising their jurisdiction, at least in *Burford* abstention cases, is founded upon a discretion they possess only in equitable cases." 47 F.3d at 355-56.

The Liquidator urges this Court to review this holding based on an inter-Circuit conflict allegedly created by a single decision: *Wolfson v. Mutual Benefit Life Ins. Co.*, 51 F.3d 141 (8th Cir. 1995). *Wolfson* involved an appeal from a District Court order declining to lift a stay on an ERISA action against an insolvent insurer. The plaintiff, Wolfson, sought to recover benefits due under an employee welfare benefits plan established by the defendant insurer. The insurer was placed into rehabilitation proceedings, leading the District Court to stay the ERISA action. The Eighth Circuit affirmed the stay, finding both *Burford* and *Colorado River* abstention principles to support such a ruling. *See* 51 F.3d at 145.

In so holding, the Eighth Circuit emphasized that the action was one against the insolvent insurer which sought "to establish a claim against the assets being administered by the state court." 51 F.3d at 146. The court distinguished a separate category of cases — ones like the present action against Allstate "in which the insolvent insurer or its receiver has asserted a claim in the federal action which, if successful, will enhance the insolvent's estate." *Id.* at 145. The Eighth Circuit noted that it had recently "refused to abstain" in such a case because, among other grounds, "adjudication of that claim in federal court would neither interfere with the receiver's control of the insolvent nor frustrate in any way the state's interests in the insolvency proceeding." *Id.* (citing *Melahn v. Pennock Ins., Inc.*, 965 F.2d 1497, 1506-07 (8th Cir. 1992).

Thus, *Wolfson* unambiguously supports the result reached by the Ninth Circuit below. Nor does *Wolfson*

present a significant doctrinal conflict with the Ninth Circuit's decision. *Wolfson's* only discussion of whether *Burford* abstention should be extended to civil damages actions came in a single paragraph at the end of the opinion, in which the court observed:

> We think it unwise to make rigid distinctions between legal and equitable claims in the merged federal system, particularly for claims such as those under ERISA whose historical antecedents are unclear. No doubt abstention is less apt to be appropriate when the federal plaintiff seeks money damages, but we do not read the Supreme Court's abstention jurisprudence as completely foreclosing abstention in money damage cases.

Id. at 147 (citation omitted).

These brief observations hardly afford a basis for this Court's intervention. To begin with, as already seen, *Wolfson* affirms the Eighth Circuit's rejection of *Burford* abstention in most civil damages actions by liquidators of insolvent insurers, the kind of case presented here. Thus, *Wolfson* and *Garamendi v. Allstate* do not present an instance of like cases being decided differently, one hallmark of Supreme Court review.

Moreover, as the above-quoted language makes clear, the Eighth Circuit's holding emphasizes the fact that the claim before it arose under ERISA, and that such statutory claims cannot readily be classified as legal or equitable in nature. To this extent, *Wolfson* does little more than suggest a possible corollary to the *Garamendi v. Allstate* holding, namely that *Burford* abstention might apply in cases that defy ready definition as equitable or legal. It remains to be seen whether the Ninth Circuit will embrace such a corollary, or instead will strictly apply an "equity only" rule. The

Ninth Circuit had no occasion to consider that issue here, since this case is clearly one at law.

Likewise, it largely remains to be seen how other Courts of Appeals will rule with respect to the application of *Burford* abstention in legal, equitable, and statutory proceedings. To the extent other circuits have addressed this issue in the wake of *NOPSI*, they all seem to be in accord with the Ninth Circuit's ruling in *Garamendi*, as the Ninth Circuit noted below. *See* 47 F.3d at 356; *see also See Fragoso v. Lopez*, 991 F.2d 878, 882 (1st Cir. 1993) (in a commercial tort action, "we think it is highly questionable whether the court is one 'sitting in equity' to which *Burford* abstention might be available") (footnote omitted); *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 271 (3d Cir. 1991) (rejecting *Burford* abstention on the ground, among others, that "[h]ere, unlike *Burford* and the other Supreme Court cases involving the *Burford* doctrine, the action was at law, not in equity, and sought money damages"); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 270 (D. Vt. 1993) (holding that *Burford* abstention is inappropriate in action between reinsurer and state insurance commissioner, as liquidator of insolvent insurer, since "the *NOPSI* distillation limits abstention under *Burford* to courts sitting in equity"); *Duane v. Government Employees Ins. Co.*, 784 F. Supp. 1209, 1223 (D. Md. 1992) (same).

That the weight of authority so strongly inclines toward limiting *Burford* abstention to equitable proceedings can be readily explained: This Court's opinions, culminating in *NOPSI*, dictate precisely such a conclusion. The Ninth Circuit traced the evolution of this Court's decisions, *see* 47 F.3d at 354-56, and there is no need to repeat that discussion in detail here. As the Ninth Circuit noted, *see* 47 F.3d at 355, *Burford* itself made it clear that the abstention

doctrine it announced was to be applied in equitable proceedings:

> Although a federal *equity court* does have jurisdiction of a particular proceeding, it may, in its sound discretion . . . refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.

319 U.S. at 317-18 (quotation marks and citations omitted; emphasis supplied). *See also Alabama Public Service Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 350-51 (1951) ("a federal *court of equity* . . . should stay its hand in the public interest when it reasonably appears that private interests will not suffer") (emphasis supplied; quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 297-98 (1943)).

As the Ninth Circuit noted, this Court has expanded some abstention doctrines to "special" classes of damages cases. *See Garamendi*, 47 F.3d at 355 & n.11. But any ambiguity regarding the application of *Burford* abstention to run-of-the-mill damages actions such as the present case was laid to rest in *NOPSI*. There, New Orleans Public Service, Inc. was challenging a utility ratemaking order of the New Orleans City Council. The Council's order partially denied NOPSI's request for a rate increase to reflect costs incurred in construction of a nuclear reactor. NOPSI filed a state court lawsuit for review of the ratemaking order. It also filed a parallel federal court lawsuit, seeking declaratory and injunctive relief on the ground that the order was preempted by federal law providing for oversight by the Federal Energy Regulatory Commission of the cost allocation. The District Court abstained under *Burford* and *Younger v. Harris*,[15] and the Fifth Circuit affirmed. This Court reversed, holding that — whatever the state's interest in the outcome of the pro-

[15] 401 U.S. 37 (1971).

ceeding — the federal court action simply did not present the potential interference with state administrative proceedings to justify federal court abstention. 491 U.S. at 372-73.

Most important for present purposes was *NOPSI's* delineation of the parameters of *Burford* abstention. The Court's re-articulation of the *Burford* abstention doctrine began with the observation that "a federal court *sitting in equity* must decline to interfere with the proceedings or orders of state administrative agencies" when the requisites for *Burford* abstention are otherwise met. 491 U.S. at 361 (emphasis supplied). *See also id.*, 491 U.S. at 360 (noting that in *Burford*, this Court concluded that "the exercise of *equitable* jurisdiction by comparatively unsophisticated Federal District Courts" should be declined) (emphasis supplied).

More fundamentally, this Court in *NOPSI* emphasized that the *Burford* abstention doctrine — as a narrow exception to the " 'virtually unflagging' " obligation of the federal courts "to adjudicate claims within their jurisdiction"— merely confers

> discretion in determining whether to grant *certain types of relief* . . . Thus, there are some classes of cases in which the withholding of authorized *equitable relief* because of undue interference with state proceedings is the 'normal thing to do.'

Id., 491 U.S. at 359 (citations omitted; quoting *Younger v. Harris*, 401 U.S. 37, 45 (1971)). Such discretion has no application in a typical action at law, in which the only relief sought is an award of money damages.

Instead, civil damages actions simply do not afford a basis for a federal court to abstain from exercising its jurisdiction under *Burford*. As this Court emphasized in *NOPSI*, the fundamental principle underlying *Burford* abstention is one of avoiding undue interference with state

administrative proceedings or orders. *See* 491 U.S. at 361-62. For instance, in *Burford*, there was an impermissible danger of federal interference because the federal court was being asked to disapprove the Texas Railway Commission's administrative approval of a permit to drill four oil wells, when the state had developed "its own elaborate review system for dealing with the geological complexities of oil and gas fields." *Colorado River*, 424 U.S. at 815 (discussing *Burford*, 319 U.S. at 326).

Thus, in *Burford*, the federal court's intervention threatened to overturn the state Railway Commission's attempt to maintain an intricate balance in the allocation of drilling rights. That risk is simply absent in a typical lawsuit for damages. No such improper interference would have been presented, for instance, if the Texas Railway Commission had filed a civil damages action in federal court, as the receiver of an insolvent drilling company, to recover payments due from third parties. This, of course, is just what the Liquidator seeks to do here.

CONCLUSION

The Petition for Certiorari fails to show facts that justify intervention by this Court. There is substantial unanimity among the circuits on the appealability of remand orders in general, and it is uncertain to what extent there is any conflict regarding the appealability of abstention-based remand orders specifically. Indeed, pending further developments in the First Circuit, it may turn out that in practice there is no divergence among the lower courts on this issue.

If the Liquidator's position on appealability of the remand order were correct, this Court would never even reach the other issue on which this Court's review is urged — the more substantive issue of whether *Burford* can justify abstention in this straightforward commercial damages action. For this reason alone, this case is not an appropriate

vehicle for reviewing the *Burford* issue. Moreover, the recent decisions in this area again reflect substantial unanimity among the lower courts. Only the Eighth Circuit's decision in *Wolfson* might be said to depart from the prevailing view. But the *Wolfson* court was careful to limit its holding to ERISA cases against the insolvent insurer, as opposed to actions at law filed by the insolvent insurer's liquidator to recover monies on the insolvent's behalf. It is a telling point that *Wolfson* — in acknowledging that *Burford* affords no basis for abstaining from civil collection actions filed on behalf of insolvent insurers — actually supports the result reached by the Ninth Circuit below.

The Liquidator's Petition for Certiorari should be denied.

DATED: September 11, 1995

Respectfully submitted,

MUNGER TOLLES & OLSON
JOSEPH D. LEE

Attorneys for Respondent
Allstate Insurance Company

APPENDICES

APPENDIX 1

MEMORANDUM TO CLERK

I certify that the judges concerned concur in this order and authorize its filing.

WILLIAM A. NORRIS
United States Circuit Judge

No. 91-55855

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GARAMENDI,* Insurance Comm. of
the State of California, in his capacity as liquidator of
MISSION INSURANCE COMPANY, et al.,
Plaintiff-Appellee,

vs.

A. STATE INSURANCE,
Defendant-Appellant,

and

INSURANCE COMPANY OF NORTH AMERICA,
Defendant.

Filed February 14, 1992

Cathy A. Catterson, Clerk, U.S. Court of Appeals

DC# CV-90-4713-WMB
Central California

ORDER

Before: NORRIS and LEAVY, Circuit Judges

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*John Garamendi has been substituted for Roxani Gillespie pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure.

Appellant's motion for an extension of time within which to file opposition to appellee's motion to dismiss the appeal is granted. The opposition shall be filed as of January 22, 1992, the date it was received.

This appeal arises from an order remanding on abstention grounds. Because the remand order was not based on jurisdictional grounds, the prohibition on appellate review imposed by 28 U.S.C. § 1447(d) does not apply. *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-52. Accordingly, the motion to dismiss is denied. However, because it is not clear whether this appeal should be more properly treated as a petition for writ of mandamus, we refer the papers filed in connection with the motion to dismiss for lack of jurisdiction to the merits panel for such consideration as it deems appropriate.

Appellant's opening brief and appellee's answering brief have been filed. The due date for the reply brief set out in this court's November 6, 1991 order is vacated. The reply brief shall be due 14 days from the date of this order. This appeal is ready for calendaring.

APPENDIX 2

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

FEDERAL ARBITRATION ACT
9 U.S.C. §§ 1-16

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure]. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the

making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure [USCS Rules of Civil Procedure], or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved

may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made

may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may

make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

§ 16. Appeals

(a) An appeal may be taken from —

(1) an order —

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.